RECORD AND / BRIEFS

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No. 16-1276

In the Supreme Court of the United States

DIGITAL REALTY TRUST, INC., PETITIONER

v.

PAUL SOMERS

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONER

BRIAN T. ASHE
KIRAN A. SELDON
SHIREEN Y. WETMORE
SEYFARTH SHAW LLP
560 Mission Street,
31st Floor
San Francisco, CA 94105

KYLE A. PETERSEN
SEYFARTH SHAW LLP
131 South Dearborn Street,
Suite 2400
Chicago, IL 60603

KANNON K. SHANMUGAM
Counsel of Record
AMY MASON SAHARIA
A. JOSHUA PODOLL
MENG JIA YANG
WILLIAMS & CONNOLLY LLP
725 Twelfth Street, N.W.
Washington, DC 20005
(202) 434-5000
kshanmugam@wc.com

QUESTION PRESENTED

Whether the anti-retaliation provision for "whistleblowers" in the Dodd-Frank Wall Street Reform and Consumer Protection Act extends to individuals who have not reported a violation of the securities laws to the Securities and Exchange Commission and thus fall outside the Act's definition of a "whistleblower."

CORPORATE DISCLOSURE STATEMENT

Petitioner Digital Realty Trust, Inc., has no parent corporation, and no publicly held company owns 10% or more of its stock.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is reported at 850 F.3d 1045. The order of the district court denying petitioner's motion to dismiss (Pet. App. 12a-47a) is reported at 119 F. Supp. 3d 1088.

JURISDICTION

The judgment of the court of appeals was entered on March 8, 2017. The petition for a writ of certiorari was filed on April 25, 2017, and granted on June 26, 2017. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 922(a) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act or Act), Pub. L. No. 111-203, 124 Stat. 1376, codified at 15 U.S.C. 78u-6, provides in relevant part:

> (a) Definitions
>
> In this section the following definitions shall apply:
>
> * * *
>
> (6) Whistleblower
>
> The term "whistleblower" means any individual who provides, or 2 or more individuals acting jointly who provide, information relating to a violation of the securities laws to the Commission, in a manner established, by rule or regulation, by the Commission.
>
> * * *
>
> (h) Protection of whistleblowers
>
> (1) Prohibition against retaliation
>
> (A) In general
>
> No employer may discharge, demote, suspend, threaten, harass, directly or indirectly, or in any other manner discriminate against, a whistleblower in the terms and conditions of employment because of any lawful act done by the whistleblower—
>
> (i) in providing information to the Commission in accordance with this section;
>
> (ii) in initiating, testifying in, or assisting in any investigation or judicial or administrative action of the Commission based upon or related to such information; or

(iii) in making disclosures that are required or protected under the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7201 et seq.), this chapter, including section 78j-1(m) of this title, section 1513(e) of Title 18, and any other law, rule, or regulation subject to the jurisdiction of the Commission.

STATEMENT

This case presents a simple question of statutory interpretation. Section 922(a) of the Dodd-Frank Act defines a "whistleblower" as an "individual who provides * * * information relating to a violation of the securities laws to the [Securities and Exchange] Commission." 15 U.S.C. 78u-6(a)(6). A "whistleblower," in turn, is protected from retaliation if, *inter alia*, he "mak[es] disclosures that are required or protected" under the Sarbanes-Oxley Act of 2002; the Securities Exchange Act of 1934; Section 1513(e) of Title 18; or any other law subject to the jurisdiction of the Securities and Exchange Commission (SEC). 15 U.S.C. 78u-6(h)(1)(A). The question presented is whether that anti-retaliation provision, applicable to "whistleblowers," extends to an individual who has not reported a violation of the securities laws to the SEC and thus falls outside the statutory definition of a "whistleblower."

Petitioner is a publicly traded real-estate investment trust that owns, acquires, and develops data centers. Respondent was petitioner's employee until he was terminated. As is relevant here, respondent sued under the Dodd-Frank Act's anti-retaliation provision, alleging that he was fired for making internal complaints protected by the Sarbanes-Oxley Act. Because respondent did not report a securities-law violation to the SEC, petitioner moved to dismiss respondent's claim on the ground

that he was not a "whistleblower" within the meaning of the statutory definition.

The district court denied the motion to dismiss, and a divided panel of the Ninth Circuit affirmed. Over a dissent from Judge Owens, the Ninth Circuit held that the anti-retaliation provision applies to any individual who makes an internal report of alleged misconduct, regardless of whether the individual reports a securities-law violation to the SEC and thus qualifies as a "whistleblower" under the statutory definition. That holding is flatly inconsistent with the plain text of the Dodd-Frank Act, as well as its structure and history. The Ninth Circuit's judgment should therefore be reversed.

A. Background

1. Congress enacted the Dodd-Frank Act in 2010, in the aftermath of the recent financial crisis. Congress's goal was to create a "new framework to prevent a recurrence or mitigate the impact of financial crises that could cripple financial markets and damage the economy." S. Rep. No. 176, 111th Cong., 2d Sess. 2 (2010). Congress recognized that "[s]ignificant aspects of the financial crisis involved securities" and that "investors needed better protection." *Id.* at 36. That, in turn, required more robust enforcement efforts by the SEC. See *ibid.*

Congress included Section 922(a), a provision entitled "Securities whistleblower incentives and protection." 124 Stat. 1841 (codified at 15 U.S.C. 78u-6 and as Section 21F of the Securities Exchange Act of 1934). That section has three primary components: a provision defining "whistleblower" and other terms; a provision establishing a reward program for "whistleblowers"; and the anti-retaliation provision, which protects "whistleblowers" from retaliation.

At the outset, the definitional provision specifies that "the following definitions shall apply" "[i]n this section": *i.e.*, throughout what is now codified as 15 U.S.C. 78u-6. 15 U.S.C. 78u-6(a). It proceeds to define a "whistleblower" as "any individual who provides * * * information relating to a violation of the securities laws to the [Securities and Exchange] Commission, in a manner established, by rule or regulation, by the Commission." 15 U.S.C. 78u-6(a)(6).

Incorporating that definition, Congress then created a reward program for "whistleblowers who voluntarily provide[] original information to the Commission that led to the successful enforcement of [a] covered judicial or administrative action." 15 U.S.C. 78u-6(b)(1). A whistleblower who qualifies for a reward under that program is guaranteed between 10% and 30% of "what has been collected of the monetary sanctions imposed in the action or related actions," *ibid.*, unless there are grounds to deny the award (for example, if the whistleblower is implicated in the prosecuted misconduct), 15 U.S.C. 78u-6(c)(2).

Finally, and of particular relevance here, Congress included an anti-retaliation provision that guarantees "[p]rotection of whistleblowers." 15 U.S.C. 78u-6(h)(1)(A). That provision states that "[n]o employer may discharge, demote, suspend, threaten, harass, directly or indirectly, or in any other manner discriminate against, a whistleblower in the terms and conditions of employment because of any lawful act done by the whistleblower" in specific circumstances set out in three separate clauses. *Ibid.*

The first clause of the anti-retaliation provision states that a whistleblower is protected from retaliation because of any lawful act done in "providing information to the Commission in accordance with this section." 15 U.S.C. 78u-6(h)(1)(A)(i). The second clause states that a

whistleblower is protected from retaliation because of any act done in "initiating, testifying in, or assisting in any investigation or judicial or administrative action of the Commission based upon or related to such information." 15 U.S.C. 78u-6(h)(1)(A)(ii). And the third clause states that a whistleblower is protected from retaliation because of any act done in "making disclosures that are required or protected" under (1) the Sarbanes-Oxley Act of 2002; (2) "this chapter" (*i.e.*, the Securities Exchange Act of 1934); (3) Section 1513(e) of Title 18, a federal criminal statute prohibiting retaliation against witnesses; or (4) "any other law, rule, or regulation subject to the jurisdiction of the Commission" (for example, the Securities Act of 1933, the Investment Company Act of 1940, and the Investment Advisers Act of 1940). 15 U.S.C. 78u-6(h)(1)(A)(iii).

2. Shortly after the enactment of the Dodd-Frank Act, the SEC initiated notice-and-comment rulemaking concerning the whistleblower provisions in Section 78u-6. Consistent with the plain text of the definitional provision of the statute, the SEC's proposed rule defined a "whistleblower" as an individual who "provides information *to the Commission* that relates to a potential violation of the securities laws." 75 Fed. Reg. 70,488, 70,489, 70,519 (Nov. 17, 2010) (emphasis added).

In its final rule, however, the SEC unexpectedly reversed course. See 76 Fed. Reg. 34,300, 34,301-34,304, 34,363 (June 13, 2011). There, the SEC set forth two different definitions of the statutory term "whistleblower." Like the proposed rule, the final rule first stated: "You are a whistleblower if * * * you provide the Commission with information pursuant to the procedures set forth in [this rule] and the information relates to a possible violation of the Federal securities laws * * * that has occurred, is ongoing, or is about to occur." 17 C.F.R.

240.21F-2(a)(1). But unlike the proposed rule, the final rule created a different definition of "whistleblower" "[f]or purposes of the anti-retaliation [provision]." 17 C.F.R. 240.21F-2(b)(1). According to that definition, an individual qualifies as a "whistleblower" under the anti-retaliation provision if the individual provides "information in a manner described in [the anti-retaliation provision]," regardless of whether the individual reported a securities-law violation *to the SEC*. 17 C.F.R. 240.21F-2(b)(1)(ii). In other words, the SEC defined "whistleblower" for purposes of the anti-retaliation provision primarily by reference not to the statutory definition of "whistleblower," but rather to the substantive activity protected by that provision.

In its proposed rule, the SEC did not suggest that it was considering expanding the definition of "whistleblower" beyond the statutory definition to include individuals who have not reported securities-law violations to the SEC, nor did it specifically request comment on such an expansion. Not surprisingly, therefore, in the final rule, the SEC did not cite any of the more than 240 comments it received to explain its deviation from the proposed rule; in fact, it provided no explanation whatsoever for the deviation. See 76 Fed. Reg. 34,301-34,304.

3. The Sarbanes-Oxley Act of 2002, enacted eight years before the Dodd-Frank Act, also contains an anti-retaliation provision protecting individuals who report fraudulent activity. That provision applies in two scenarios. *First*, it prohibits retaliation against an "employee" because of any act done in "provid[ing] information, caus[ing] information to be provided, or otherwise assist[ing] in an investigation regarding any conduct which the employee reasonably believes constitutes a violation" of certain criminal fraud statutes, any SEC rule or regulation, or "any provision of Federal law relating to fraud

against shareholders." 18 U.S.C. 1514A(a)(1). Under that provision, an employee qualifies for protection if he reports the alleged misconduct not just to the SEC, but to an internal supervisor, any other federal agency, or Congress. *Ibid.* *Second*, the provision prohibits retaliation against an "employee" because of any act done in "fil[ing], caus[ing] to be filed, testify[ing], participat[ing] in, or otherwise assist[ing] in a proceeding filed or about to be filed * * * relating to an alleged violation" of the same provisions of federal law. 18 U.S.C. 1514A(a)(2).

4. The anti-retaliation regimes in the Dodd-Frank Act and the Sarbanes-Oxley Act differ in a number of important respects. Most notably, the Dodd-Frank Act's anti-retaliation provision applies by its terms only to individuals who qualify as "whistleblowers," see 15 U.S.C. 78u-6(h)(1)(A), whereas the Sarbanes-Oxley Act's provision applies to all "employees," see 18 U.S.C. 1514A(a).

In addition, under the Dodd-Frank Act, a whistleblower may bring suit directly in federal court. See 15 U.S.C. 78u-6(h)(1)(B)(i). Under the Sarbanes-Oxley Act, however, an employee must first exhaust administrative remedies by filing a complaint with the Secretary of Labor; the employee may bring suit in federal court only if the Secretary does not issue a final decision within 180 days of filing. See 18 U.S.C. 1514A(b)(1).

The limitations period for an anti-retaliation claim under the Dodd-Frank Act is at least six years, see 15 U.S.C. 78u-6(h)(1)(B)(iii),[1] but the corresponding period

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[1] A cause of action under the Dodd-Frank Act's anti-retaliation provision may not be brought "more than 6 years after the date on which the violation * * * occurred," except that it may be brought within "3 years after the date when facts material to the right of action are known or reasonably should have been known by the em-

under the Sarbanes-Oxley Act is only six months, see 18 U.S.C. 1514A(b)(2)(D). And under the Dodd-Frank Act, a whistleblower may seek double backpay, see 15 U.S.C. 78u-6(h)(1)(C)(ii), but that remedy is not available under the Sarbanes-Oxley Act, see 18 U.S.C. 1514A(c)(2)(B).

B. Facts And Procedural History

1. Petitioner is a real-estate investment trust that owns, acquires, and develops data centers. Petitioner hired respondent as a vice president of portfolio management in 2010, and it fired him in April 2014. Pet. App. 14a-15a.

In November 2014, respondent filed suit against petitioner and Ellen Jacobs, a senior vice president for human resources, in the United States District Court for the Northern District of California.[2] Respondent alleged that, shortly before being fired, he had complained to senior management that his supervisor had eliminated some internal controls over certain corporate actions, allegedly in violation of the Sarbanes-Oxley Act. It is undisputed that respondent did not report any violation of the securities laws to the SEC. He nevertheless asserted in his complaint that petitioner had retaliated against him in violation of the Dodd-Frank Act's anti-retaliation provision by firing him for, *inter alia*, internally reporting the alleged misconduct. Petitioner also asserted a variety of other claims under federal and state law. Pet. App. 3a, 14a-15a.

2. Petitioner moved to dismiss the Dodd-Frank Act claim. Petitioner argued that respondent was not a

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ployee" (but in no event "more than 10 years after the date on which the violation occur[red]"). 15 U.S.C. 78u-6(h)(1)(B)(iii)(I), (II).

[2] Ms. Jacobs was not named as a defendant on the Dodd-Frank Act claim.

"whistleblower" within the meaning of the anti-retaliation provision because he did not report a securities-law violation to the SEC. As a result, the anti-retaliation provision did not apply. Pet. App. 13a.

The district court denied the motion. Pet. App. 12a-47a. At the outset, the court acknowledged that the Dodd-Frank Act "defines a 'whistleblower' as 'any individual who provides * * * information relating to a violation of the securities laws *to the Commission*.'" *Id.* at 18a-19a (ellipsis in original) (quoting 15 U.S.C. 78u-6(a)(6)). It also recognized that the only court of appeals to have considered the question had held that an individual must report a securities-law violation to the SEC in order to qualify as a "whistleblower" within the meaning of the anti-retaliation provision. *Id.* at 25a n.4 (citing *Asadi* v. *G.E. Energy (USA), L.L.C.*, 720 F.3d 620 (5th Cir. 2013)).

The district court nevertheless concluded that the language in the statutory definition was ambiguous in light of the third clause of the anti-retaliation provision, which "prohibit[s] retaliatory acts against employees who make" internal as well as external disclosures. Pet. App. 26a. Because the court could not "find a clear and simple way to read the statutory provisions * * * in perfect harmony with one another," it deferred to the SEC's interpretation, under which an individual who makes only an internal disclosure is a "whistleblower" for purposes of the anti-retaliation provision of the Dodd-Frank Act. *Id.* at 40a-43a. Recognizing a "serious split of authority" on the issue, the district court certified its order for interlocutory review. *Id.* at 46a-47a; D. Ct. Dkt. 61, at 4 (July 22, 2015).

3. The court of appeals granted interlocutory review. After review was granted, but before the case was decided, a divided panel of the Second Circuit issued an

opinion disagreeing with the Fifth Circuit and holding that an individual who makes only an internal disclosure is a "whistleblower" for purposes of the Dodd-Frank Act's anti-retaliation provision. See *Berman* v. *Neo @Ogilvy LLC*, 801 F.3d 145 (2015). Judge Jacobs dissented in that case, concluding that the Fifth Circuit had correctly decided the question in *Asadi*. See *id.* at 155-160.

4. On interlocutory review, a divided panel of the court of appeals affirmed. Pet. App. 1a-11a.

a. The court of appeals acknowledged at the outset that Section 78u-6(a)(6) defines a "whistleblower," for purposes of the entire section, as an individual who "provides * * * information relating to a violation of the securities laws to the Commission." Pet. App. 5a. But the court reasoned that the definition of "whistleblower" "should not be dispositive of the scope of [the] anti-retaliation provision," because "[t]erms can have different operative consequences in different contexts." *Id.* at 7a (citing *King* v. *Burwell*, 135 S. Ct. 2480, 2489 (2015)). According to the court, "[s]tatutory definitions are * * * just one indication of meaning," and the anti-retaliation provision "unambiguously and expressly protects from retaliation all those who report to the SEC and who report internally." *Id.* at 7a-8a (internal quotation marks, brackets, and citation omitted).

A contrary interpretation, the court of appeals continued, would "make little practical sense and undercut congressional intent." Pet. App. 8a. In the court's view, applying the statutory definition of "whistleblower" would "narrow[] [the third clause of the anti-retaliation provision] to the point of absurdity." *Ibid.* The court noted that individuals who made both internal disclosures and reports to the SEC would still be covered, but it surmised that "[e]mployees are not likely to report in

both ways." *Ibid.* The court believed that a broader interpretation was necessary to "give effect to all statutory language." *Ibid.*

For that reason, the court of appeals concluded that the anti-retaliation provision "should be read to provide protections to those who report internally as well as to those who report to the SEC." Pet. App. 10a. The court added that, "even if the use of the word 'whistleblower' in the anti-retaliation provision creates uncertainty because of the earlier narrow definition of the term," the SEC's interpretation was entitled to deference. *Ibid.* The court reasoned that the SEC's interpretation "accurately reflects Congress's intent to provide broad whistleblower protections under [the Dodd-Frank Act]." *Ibid.*

b. Judge Owens dissented. Pet. App. 11a. He indicated that he would have held that the anti-retaliation provision reaches only individuals who fall within the Act's definition of "whistleblower," based on the reasoning of the Fifth Circuit in *Asadi* and Judge Jacobs' dissent in *Berman*. *Ibid.* He added that, to the extent the majority relied on this Court's decision in *King*, *supra*, "we should quarantine *King* * * * to the specific facts of that case." *Ibid.*

SUMMARY OF ARGUMENT

This case turns on a principle of statutory interpretation so self-evident that it hardly needs stating: where a statute includes an express definition of a term, courts and agencies may not invent a different definition. In adopting a definition of "whistleblower" that is more expansive than the one Congress actually provided in the Dodd-Frank Act, the Ninth Circuit and the SEC violated that unimpeachable principle. The Ninth Circuit's broader definition is profoundly atextual; it cannot be

reconciled with the statute's structure and history; and it threatens to render the separate anti-retaliation regime of the Sarbanes-Oxley Act effectively obsolete. The Ninth Circuit's interpretation of the Dodd-Frank Act is simply untenable, and its judgment should therefore be reversed.

A. In Section 922(a) of the Dodd-Frank Act, Congress defined the statutory term "whistleblower" and instructed courts to apply that definition "[i]n this section"—a section that includes the Act's anti-retaliation provision. The statutory definition of "whistleblower" delineates the *category of individuals* entitled to protection under the anti-retaliation provision: namely, individuals who "provide[] * * * information relating to a violation of the securities laws to the [Securities and Exchange] Commission." The anti-retaliation provision, in turn, describes the *conduct* that gives rise to a cause of action for retaliation. Under the anti-retaliation provision, even if a person has been the victim of retaliatory conduct, he must still be within the category of individuals covered by that provision—a "whistleblower," as the term is defined in the statute—in order to have a cause of action.

That conclusion inexorably flows from the statute's text and is wholly consistent with the statute's structure and history. Section 922(a) of the Dodd-Frank Act was intended to encourage individuals to report securities-law violations to the SEC. It accomplishes that goal through two substantive provisions that work in tandem. The first creates financial incentives for individuals to report securities-law violations to the SEC; the second, at issue here, protects individuals who report to the SEC against retaliation. In the legislative history, Congress confirmed that its intent was to create a "new, robust whistleblower program designed to motivate people who

know of securities law violations to tell the SEC." In fact, Congress rejected a version of the anti-retaliation provision that would have applied broadly to all employees, instead limiting the reach of that provision (and the rest of Section 922(a)) to "whistleblowers"—a defined term covering only those who report to the SEC.

The foregoing interpretation also preserves the balance between the anti-retaliation provisions of the Sarbanes-Oxley Act and the Dodd-Frank Act. The Sarbanes-Oxley Act protects "employees" from retaliation when they report violations of certain federal laws to a supervisor, a federal agency, or Congress. In enacting that provision, Congress declined to create a private right of action for such employees, instead requiring them to pursue an administrative remedy with the Secretary of Labor. The Ninth Circuit's interpretation of the Dodd-Frank Act's anti-retaliation provision substantially diminishes the role of the Sarbanes-Oxley Act's regime, because it authorizes *any* employee who made a protected disclosure to proceed directly in federal court under the Dodd-Frank Act, regardless of whether the employee reported a securities-law violation to the SEC. There is no indication in the text or history of the Dodd-Frank Act that Congress intended to effect such a sweeping change in the existing regime.

B. The Ninth Circuit justified its decision to disregard the statutory definition of "whistleblower" on the ground that applying that definition would give an absurdly narrow meaning to the third clause of the Dodd-Frank Act's anti-retaliation provision. That is incorrect. The third clause protects individuals who make disclosures both to the SEC and to a supervisor, another federal agency, or Congress, but who are disciplined because of the latter disclosure. The Ninth Circuit also expressed concern that lawyers and outside auditors would

not qualify for protection under the plain-text interpretation because they would typically be required to report internally before reporting to the SEC. But there is no reason to think that Congress specifically intended to protect those two groups in the third clause. Congress acts within its authority when it enacts legislation that protects some groups of persons but not others. The Ninth Circuit's halfhearted resort to the absurdity canon does not save its atextual interpretation of the statute.

C. The SEC's interpretation in its final rule—which creates a separate and more expansive definition of "whistleblower" for purposes of the anti-retaliation provision—is not entitled to any deference. Courts do not defer to an agency interpretation when the underlying statute is unambiguous, and there is no ambiguity in the Dodd-Frank Act's whistleblower provisions.

Even if there were some ambiguity, moreover, the SEC's interpretation would still not be entitled to deference under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), because the SEC's rule was procedurally defective. The SEC promulgated an interpretation in its final rule that was the diametric opposite of the interpretation in its proposed rule, without providing any notice that it was considering such a change. Compounding that defect, the SEC failed to provide any explanation for its novel interpretation. And the SEC's interpretation lacks the power to persuade and should therefore be rejected altogether.

While aspects of the statutory regime at issue may be complex, this case is easy. Because respondent concededly did not report a violation of the securities laws to the SEC, he is not entitled to sue under the Dodd-Frank Act's anti-retaliation provision. The judgment of the Ninth Circuit should therefore be reversed.

ARGUMENT

IN ORDER TO QUALIFY AS A 'WHISTLEBLOWER' FOR PURPOSES OF THE ANTI-RETALIATION PROVISION OF THE DODD-FRANK ACT, AN INDIVIDUAL MUST REPORT A VIOLATION OF THE SECURITIES LAWS TO THE SEC

A. The Dodd-Frank Act Unambiguously Requires Reporting A Securities-Law Violation To The SEC

1. The Statutory Definition Of 'Whistleblower' Plainly Applies To The Anti-Retaliation Provision

As in all statutory-interpretation cases, the Court's analysis should begin with the text. See, *e.g.*, *Henson* v. *Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1721 (2017). And because the text here is clear, "that is also where the inquiry should end." *Puerto Rico* v. *Franklin California Tax-Free Trust*, 136 S. Ct. 1938, 1946 (2016) (internal quotation marks and citation omitted).

a. The Dodd-Frank Act's anti-retaliation provision states that "[n]o employer may discharge, demote, suspend, threaten, harass, directly or indirectly, or in any other manner discriminate against, a whistleblower in the terms and conditions of employment because of any lawful act done by the whistleblower" in specific circumstances set out in three separate clauses. 15 U.S.C. 78u-6(h)(1)(A). The anti-retaliation provision identifies who is protected—a "whistleblower." *Ibid.* And it specifies what the whistleblower is protected from—retaliation on account of (i) "providing information to the Commission in accordance with this section"; (ii) "initiating, testifying in, or assisting in any investigation or judicial or administrative action of the Commission"; or (iii) "making disclosures that are required or protected" under certain federal laws. *Ibid.*

The Dodd-Frank Act, moreover, supplies a definition of "whistleblower": "[t]he term 'whistleblower' means any individual who provides, or 2 or more individuals acting jointly who provide, information relating to a violation of the securities laws to the Commission, in a manner established, by rule or regulation, by the Commission." 15 U.S.C. 78u-6(a)(6). That definition unambiguously requires the reporting of a violation of the securities laws to the SEC.

Where "a statute includes an explicit definition," the Court "must follow that definition, even if it varies from th[e] term's ordinary meaning." *Stenberg* v. *Carhart*, 530 U.S. 914, 942 (2000). That is because a statutory definition is Congress's "own glossary," and "[t]here would be little use in such a glossary if [the Court] were free in despite of it to choose a meaning for [itself]." *Fox* v. *Standard Oil Co. of New Jersey*, 294 U.S. 87, 95-96 (1935); see *Federal Power Commission* v. *Tuscarora Indian Nation*, 362 U.S. 99, 111 (1960). For that reason, "[i]t is axiomatic that the statutory definition of [a] term excludes unstated meanings." *Meese* v. *Keene*, 481 U.S. 465, 484 (1987); see *Colautti* v. *Franklin*, 439 U.S. 379, 392-393 n.10 (1979); 2A Norman J. Singer & J.D. Shambie Singer, *Sutherland on Statutes and Statutory Construction* § 47:7, at 306-312 & nn. 2-3, 9 (7th ed. 2014).

Nor is there any ambiguity that the statutory definition of "whistleblower" applies to the anti-retaliation provision. The definitional subsection itself commands that "[i]n this section" (*i.e.*, Section 78u-6, which includes the anti-retaliation provision) "the following definitions *shall* apply." 15 U.S.C. 78u-6(a) (emphasis added). The statutory term "shall" "normally creates an obligation impervious to judicial discretion." *Lexecon Inc.* v. *Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 34-35

(1998); see *Kingdomware Technologies, Inc.* v. *United States*, 136 S. Ct. 1969, 1977 (2016).

The resulting syllogism is straightforward. Section 78u-6(h)(1)(A) prohibits retaliation against a particular category of persons: namely, a "whistleblower." In Section 78u-6 (including subsection (h)(1)(A)), that term "means any individual who provides * * * information relating to a violation of the securities laws to the Commission." 15 U.S.C. 78u-6(a)(6). Individuals who do not satisfy those criteria are not "whistleblower[s]," *ibid.*, and thus do not qualify for protection under the anti-retaliation provision in Section 78u-6(h)(1)(A). See *Carhart*, 530 U.S. at 942; *Fox*, 294 U.S. at 95-96.

b. In *Lamie* v. *United States Trustee*, 540 U.S. 526 (2004), this Court construed statutory provisions with a similar configuration in a similar manner. There, the Court considered whether a debtor's attorney in a Chapter 7 bankruptcy proceeding could recover his fees under Section 330 of the Bankruptcy Code. That section allowed "a trustee, an examiner, [or] a professional person employed under section 327 or 1103" to recover, *inter alia*, "reasonable compensation for actual, necessary services rendered by the trustee, examiner, professional person, or attorney and by any paraprofessional person employed by any such person." *Id.* at 530 (quoting 11 U.S.C. 330(a)(1)).

In *Lamie*, the petitioner, a bankruptcy lawyer, began providing legal services to a client in a Chapter 11 bankruptcy proceeding. See 540 U.S. at 531-532. Shortly after that proceeding began, the bankruptcy court converted the proceeding into a Chapter 7 proceeding. See *id.* at 532. The conversion ended the lawyer's "service under § 327 as an attorney for the debtor-in-possession." *Ibid.* After the conversion, however, the lawyer continued providing legal services to the debtor without the

trustee's authorization. See *ibid.* The lawyer then sought fees under Section 330 for the time he spent working on the debtor's behalf after the conversion. See *ibid.*

The lower courts uniformly held that the lawyer was not entitled to fees under Section 330, and this Court agreed. The Court began by observing that, although "[t]he statute is awkward, and even ungrammatical," "that does not make it ambiguous on the point at issue." 540 U.S. at 534. "In its first part," the Court explained, "the statute authorizes an award of compensation to one of three types of persons: trustees, examiners, and § 327 professional persons." *Ibid.* "A debtor's attorney not engaged as provided by § 327," the Court continued, "is simply not included within the class of persons eligible for compensation." *Ibid.* As a result, the subsequent language in the provision defining "what type of compensation may be awarded" did not come into play: "[u]nless the applicant for compensation is in one of the named classes of persons in the first part, the kind of service rendered is irrelevant." *Ibid.*

A similar analysis applies here. "In its first part," the anti-retaliation provision protects one "type[] of person[]": a "whistleblower." *Lamie*, 540 U.S. at 534. An individual who does not qualify as a "whistleblower" within the meaning of the statute "is simply not included within the class of persons eligible" for anti-retaliation protection. *Ibid.* And as in *Lamie*, whether an individual has engaged in (or been subjected to) the type of *conduct* described by the anti-retaliation provision is "irrelevant" if the individual is not within the *category of individuals* covered by the provision in the first place. See *ibid.*

2. *The Anti-Retaliation Provision's Place In The Broader Statutory Scheme Confirms The Plain-Text Interpretation*

The foregoing interpretation accords with the anti-retaliation provision's "place in the statutory scheme and, in particular, its relationship to the other protections that the Act affords." *Jones* v. *Harris Associates L.P.*, 559 U.S. 335, 348 (2010); see, *e.g.*, Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 167 (2012).

a. As its title—"Securities whistleblower incentives and protection"—suggests, Section 922(a) of the Dodd-Frank Act contains two types of substantive provisions applicable to "whistleblowers." It first provides financial "incentives" for whistleblowers to report securities-law violations to the SEC. Those incentives are tied to the SEC's receipt of information about, and pursuit of enforcement actions for, such violations: in order to qualify for an award, a whistleblower must "voluntarily provide[] original information to the Commission," and that information must lead to the "successful enforcement" of an action "brought by the Commission under the securities laws." 15 U.S.C. 78u-6(a)(1), (b)(1).

A whistleblower who satisfies those criteria is entitled to an award of 10% to 30% of "what has been collected of the monetary sanctions imposed in the action or related actions." 15 U.S.C. 78u-6(b)(1). In determining the amount of the award, the SEC considers a number of factors: specifically, "the significance of the information provided by the whistleblower to the success" of the covered action; "the degree of assistance" provided by the whistleblower; and "the programmatic interest of the Commission in deterring violations of the securities laws by making awards to whistleblowers who provide infor-

mation that lead[s] to the successful enforcement of such laws." 15 U.S.C. 78u-6(c)(1)(B)(i).

The award provision thus focuses on the connection between a whistleblower's information and the SEC's enforcement efforts. It incents whistleblowers to report information about securities-law violations. And it makes that incentive stronger as the information and assistance the SEC receives become more significant.

b. Section 922(a) of the Dodd-Frank Act also provides "protection" for whistleblowers who report securities-law violations to the SEC. The anti-retaliation provision reinforces the award provision's monetary incentives. It prohibits retaliation in specific circumstances set out in three separate clauses, the first two of which work hand in glove with the award provision. *First*, under the award provision, a whistleblower is entitled to receive an award if he "voluntarily provided original information to the Commission," 15 U.S.C. 78u-6(b)(1), "in such form as the Commission may, by rule, require," 15 U.S.C. 78u-6(c)(2)(D). Similarly, under the first clause of the anti-retaliation provision, an employer may not retaliate against a whistleblower for "providing information to the Commission in accordance with this section." 15 U.S.C. 78u-6(h)(1)(A)(i).

Second, under the award provision, "the degree of assistance" a whistleblower provides is a factor in determining the amount of the award the whistleblower receives. 15 U.S.C. 78u-6(c)(1)(B)(i). Under the second clause of the anti-retaliation provision, an employer may not retaliate against a whistleblower for "initiating, testifying in, or assisting in any investigation or judicial or administrative action of the Commission" based on information the whistleblower provided. 15 U.S.C. 78u-6(h)(1)(A)(ii). The award and anti-retaliation provisions thus work together to motivate individuals both to pro-

vide information to the SEC and to assist the SEC in using that information in any subsequent enforcement action.

While less explicitly tied to the award provision, the third clause of the anti-retaliation provision serves a similar purpose. An individual may well report alleged misconduct both to the SEC and to another entity, such as the individual's employer, another federal agency, or Congress. The award provision indisputably applies to such an individual. But if an employer retaliates against such an individual "because of" the latter, non-SEC disclosure, the individual would not qualify for anti-retaliation protection under either of the first two clauses. See *Asadi* v. *G.E. Energy (USA), L.L.C.*, 720 F.3d 620, 627-628 (5th Cir. 2013). The third clause fills that gap.

Under the third clause, an employer may not retaliate against a whistleblower for "making disclosures that are required or protected under the Sarbanes-Oxley Act of 2002 * * *, this chapter, * * * [,] section 1513(e) of Title 18, and any other law, rule, or regulation subject to the jurisdiction of the Commission." 15 U.S.C. 78u-6(h)(1)(A)(iii). By virtue of that clause, a whistleblower who reports alleged misconduct both to the SEC and to another entity has the same protection from retaliation—and thus the same incentive to report to the SEC—as a whistleblower who does not make the additional disclosure.

In short, the Dodd-Frank Act's whistleblower provisions work in tandem to create a coherent statutory scheme. That scheme gives individuals an incentive to report securities-law violations to the SEC and to cooperate in subsequent SEC enforcement actions. And it reinforces those incentives by providing those individuals with broad protection against retaliation. Extending

anti-retaliation protection to individuals who have not reported securities-law violations to the SEC would divorce the anti-retaliation provision from the rest of the section.

c. Another provision of the Dodd-Frank Act similarly supports the plain-text interpretation of the anti-retaliation provision. Title 10 of the Dodd-Frank Act, which created the Consumer Financial Protection Bureau (CFPB), also contains an anti-retaliation provision. That provision, Section 1057, prohibits retaliation against a "covered employee" who provides "information to the employer, the Bureau, or any other State, local, or Federal, government authority or law enforcement agency" about a violation of laws within the CFPB's jurisdiction. 12 U.S.C. 5567(a)(1).

"[W]hen Congress includes particular language in one section of a statute but omits it in another," this Court "presumes that Congress intended a difference in meaning." *Loughrin* v. *United States*, 134 S. Ct. 2384, 2390 (2014) (internal quotation marks, alteration, and citation omitted); see, *e.g.*, *Jama* v. *Immigration and Customs Enforcement*, 543 U.S. 335, 341 (2005). That principle applies with full force in this case. Unlike the anti-retaliation provision at issue here, the CFPB's anti-retaliation provision protects any "covered employee." 12 U.S.C. 5567(a)(1). That phrase is defined to reach "any individual performing tasks related to the offering or provision of a consumer financial product or service," without any additional requirement that the individual report alleged misconduct to the CFPB (or any other entity). 12 U.S.C. 5567(b). Here, by contrast, the category of covered individuals—"whistleblowers"—is subject to precisely such a requirement. As the CFPB's anti-retaliation provision confirms, Congress plainly knew how to draft an anti-retaliation provision that covered a

broader category of individuals, but it conspicuously did not do so in the provision at issue here.

3. The Legislative History of the Dodd-Frank Act Also Supports The Plain-Text Interpretation

The legislative history of the Dodd-Frank Act confirms the plain-text interpretation of the anti-retaliation provision. In Section 922(a) of the Act, Congress set out to create a "new, robust whistleblower program designed to motivate people who know of securities law violations to tell the SEC." S. Rep. No. 176, *supra*, at 38. The idea was to enlist whistleblowers to "assist the [g]overnment to identify and prosecute persons who have violated securities laws" and thereby "recover money for victims of financial fraud." *Id.* at 110. In other words, Section 922(a) was designed to channel information about a certain kind of misconduct (securities-law violations) to a certain place (the agency that enforces the federal securities laws).

Congress intended for the Dodd-Frank Act's whistleblower provisions to work together to achieve that goal. Congress knew that monetary awards would provide a powerful incentive to report misconduct to the SEC. See S. Rep. No. 176, *supra*, at 111. But it also understood that whistleblowers who are employees run a serious risk when they expose their employers' misconduct in that manner. As the Senate Banking Committee observed, such whistleblowers "often face the difficult choice between telling the truth and the risk of committing 'career suicide.'" *Ibid.*

To mitigate that risk, Congress established a "robust" regime that pairs "ampl[e] reward[s]" with a cause of action that imposes substantial penalties for retaliation. S. Rep. No. 176, *supra*, at 38, 111. Specifically, that cause of action allows a plaintiff to proceed directly in

federal court without exhausting administrative remedies, see 15 U.S.C. 78u-6(h)(1)(B)(i), and to seek double backpay, see 15 U.S.C. 78u-6(h)(1)(C)(ii), and it sets a generous limitations period of at least six years, see 15 U.S.C. 78u-6(h)(1)(B)(iii); p. 8 n.1, *supra*. Congress thus intended for whistleblowing employees—who face heightened risks when they report their employers' misconduct to the SEC—to have heightened protection against retaliation under the Dodd-Frank Act.

The history of the anti-retaliation provision supports that conclusion. When it originated in the House of Representatives, the anti-retaliation provision initially read: "No employer may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee, contractor, or agent in the terms and conditions of employment because of any lawful act done by the employee, contractor, or agent" in providing information to the SEC or in assisting in any SEC investigation or action based on the information. Wall Street Reform and Consumer Protection Act of 2009, H.R. 4173, 111th Cong. § 7203(a) (2009). While the bill defined a "whistleblower" as an individual who submitted information to the SEC, see *ibid.*, the anti-retaliation provision did not use the defined term "whistleblower," instead applying to "an employee, contractor, or agent."

But Congress ultimately rejected that version of the anti-retaliation provision. In its later version of the bill, the Senate replaced the phrase "employee, contractor, or agent" with the defined term "whistleblower." See Restoring American Financial Stability Act of 2010, S. 3217, 111th Cong. § 922 (2010). That defined term carried through to the enacted version of the provision. See 15 U.S.C. 78u-6(h)(1)(A).

"Few principles of statutory construction are more compelling than the proposition that Congress does not

intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language." *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 442-443 (1987); see *Chickasaw Nation* v. *United States*, 534 U.S. 84, 93 (2001); *Gulf Oil Corp.* v. *Copp Paving Co.*, 419 U.S. 186, 199-201 (1974). That principle applies with full force here. The House initially proposed an anti-retaliation provision that would apply to all employees. But the Senate narrowed the provision to cover only "whistle-blowers," and Congress enacted the narrower version. This Court should reject an interpretation of the anti-retaliation provision that would effectively restore the discarded statutory language.

4. The Plain-Text Interpretation Best Preserves The Sarbanes-Oxley Act's Anti-Retaliation Regime

Finally, the plain-text interpretation of the anti-retaliation provision best reconciles that provision with its counterpart in the Sarbanes-Oxley Act.

As this Court recently recognized, the anti-retaliation provisions in the Sarbanes-Oxley Act and the Dodd-Frank Act serve different purposes. The Sarbanes-Oxley Act's provision protects "employees who provide information to any person with supervisory authority over the employee," whereas the Dodd-Frank Act's provision "focuses primarily on reporting to federal authorities." *Lawson* v. *FMR LLC*, 134 S. Ct. 1158, 1175 (2014) (internal quotation marks and citation omitted). Those different purposes reflect the distinct contexts in which the two statutes were enacted: adopted in the wake of the Enron scandal, the Sarbanes-Oxley Act aimed to "prevent and punish corporate and criminal fraud," *id.* at 1162 (quoting S. Rep. No. 146, 107th Cong., 2d Sess. 2 (2002)), whereas the Dodd-Frank Act was specifically

intended to enable the SEC to engage in more robust enforcement, see pp. 4, 24-25, *supra*.

Accordingly, the Sarbanes-Oxley Act's anti-retaliation provision is different in scope from the Dodd-Frank Act's. The former provision offers broad protection to employees of publicly traded companies who expose fraudulent activity. See *Lawson*, 134 S. Ct. at 1162-1163. As discussed above, the provision covers "employees" who report violations of certain criminal fraud statutes, any SEC rule or regulation, or "any provision of Federal law relating to fraud against shareholders"—regardless of whether the employee makes his report to the SEC, an internal supervisor, any other federal agency, or Congress. 18 U.S.C. 1514A(a)(1); see pp. 7-8.

At the same time, the Sarbanes-Oxley Act's anti-retaliation provision has important limitations. Most importantly, in order to invoke the provision, an employee must first file an administrative complaint with the Secretary of Labor, see 18 U.S.C. 1514A(b)(1)(A), and must do so within six months of the alleged retaliation, see 18 U.S.C. 1514A(b)(2)(D). Only if the Secretary of Labor does not issue a final decision within 180 days may the employee bring suit in federal court. See 18 U.S.C. 1514A(b)(1)(B). A successful plaintiff, moreover, is limited to the "relief necessary to make the employee whole"—*i.e.*, reinstatement, backpay, and special damages. 18 U.S.C. 1514(c)(1)-(2).

Those limitations are not accidental. Quite to the contrary, much as it did with the Dodd-Frank Act, Congress specifically rejected proposals that did not suit its statutory design. For example, Congress considered whether to give employees the option of proceeding directly in federal court, and ultimately decided not to do so. Compare Corporate and Criminal Fraud Accountability Act of 2002, S. 2010, 107th Cong. § 7(a) (as intro-

duced in Senate, Mar. 12, 2002) (allowing an employee to choose between filing a complaint with the Secretary of Labor and bringing suit in federal court), with 18 U.S.C. 1514A(b)(1)(A) (requiring an employee to file a complaint first with the Secretary of Labor). And Congress considered whether to provide double backpay to successful plaintiffs, and ultimately decided not to do so either. Compare Corporate and Criminal Fraud Accountability Act of 2002, S. 2010, 107th Cong. § 7(a) (as introduced in Senate, Mar. 12, 2002) (providing for double backpay), with 18 U.S.C. 1514A(c)(2)(B) (providing only for backpay). In rejecting those proposals and compromising on an amended version, some members of the Senate Judiciary Committee expressed concern that a "private cause of action" and "excessive damages" might lead to "frivolous claims that abuse the protections [Congress sought] to bestow." S. Rep. No. 146, *supra*, at 26.

When Congress enacted the Dodd-Frank Act eight years later, it sought in the whistleblower provisions to create additional incentives for individuals to report securities-law violations to the SEC. Accordingly, the Dodd-Frank Act's anti-retaliation provision lacks many of the limitations from its counterpart in the Sarbanes-Oxley Act. As discussed above, the Dodd-Frank Act allows a whistleblower to proceed directly in federal court without exhausting administrative remedies and to seek double backpay, and it sets a generous limitations period of at least six years. See pp. 24-25, *supra*.

In short, the two anti-retaliation provisions are not coextensive. The Ninth Circuit's interpretation of the Dodd-Frank Act's provision would upset the balance between the two provisions, giving plaintiffs procedural advantages and remedies that Congress deliberately rejected in the Sarbanes-Oxley Act and thus threatening to

render the Sarbanes-Oxley Act's provision effectively obsolete.

This case, in fact, appears to be a prime example of that danger. Respondent attempted to do under the Dodd-Frank Act what Congress declined to allow under the Sarbanes-Oxley Act: namely, to proceed directly in federal court, seeking double backpay, based on an allegation that his employer retaliated against him for internally reporting alleged violations of the Sarbanes-Oxley Act itself. But respondent did not seek to file an administrative complaint with the Secretary of Labor under the Sarbanes-Oxley Act's anti-retaliation provision, though he seemingly takes the position he was entitled to do so. See Compl. ¶¶ 47, 54, at 8-9, 9-10 (Nov. 24, 2014). Nor is respondent alone in that approach: out of the more than thirty cases involving the question presented, it appears that only four plaintiffs chose to file administrative complaints with the Secretary of Labor.[3] Under the Ninth Circuit's interpretation, plaintiffs would have little incentive to pursue relief under the Sarbanes-Oxley Act's anti-retaliation provision.

At a minimum, then, the Ninth Circuit's interpretation would substantially reduce the role of the Sarbanes-Oxley Act's provision. But there is no indication in the text or legislative history of the Dodd-Frank Act that Congress intended to work such a substantial change in the existing regime. As this Court famously put it,

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[3] See *Wadler* v. *Bio-Rad Laboratories, Inc.*, 141 F. Supp. 3d 1005, 1010-1011 (N.D. Cal. 2015); *Duke* v. *Prestige Cruises International, Inc.*, Civ. No. 14-23017, 2015 WL 4886088, at *3 (S.D. Fla. Aug. 14, 2015); *Peters* v. *LifeLock Inc.*, Civ. No. 14-576, 2014 WL 12544495, at *3-*7 (D. Ariz. Sept. 19, 2014); *Genberg* v. *Porter*, 935 F. Supp. 2d 1094, 1099 (D. Colo. 2013), aff'd in part on other grounds and dismissed in part, 566 Fed. Appx. 719 (10th Cir. 2014).

"Congress * * * does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes." *Whitman* v. *American Trucking Associations, Inc.*, 531 U.S. 457, 468 (2001).

So too here. An interpretation of the Dodd-Frank Act's anti-retaliation provision that requires reporting to the SEC avoids disruption of the Sarbanes-Oxley Act's preexisting regime. And it is the only interpretation consistent with the text, structure, and history of the Dodd-Frank Act itself. This Court should adopt that interpretation.

B. An Interpretation That Requires Reporting To The SEC Does Not Produce Absurd Results

In the decision under review, the Ninth Circuit refused to apply the Dodd-Frank Act's statutory definition of "whistleblower" to the anti-retaliation provision on the ground that doing so would "narrow[] [the third clause of the provision] to the point of absurdity." Pet. App. 8a. That concern is unfounded. It was perfectly reasonable for Congress to establish reporting a securities-law violation to the SEC as a prerequisite for invoking the Dodd-Frank Act's anti-retaliation provision. The Ninth Circuit's interpretation should therefore be rejected.

1. It is a familiar principle of statutory interpretation that, "when a statute's language is plain, the sole function of the courts * * * is to enforce it according to its terms," unless "the disposition required by the text [would be] absurd." *Sebelius* v. *Cloer*, 133 S. Ct. 1886, 1896 (2013) (alteration and citation omitted). Consistent with that principle, this Court does not "rescue Congress from its drafting errors" or "provide for what [the Court] might think * * * is the preferred result." *Lamie*, 540 U.S. at 542 (ellipsis in original; citation omitted). Even

when it is "entirely certain that [ignoring the plain text] would more effectively achieve the purposes" of the statute, the Court's task is to "apply the text, not to improve upon it." *Pavelic & LeFlore* v. *Marvel Entertainment Group*, 493 U.S. 120, 126 (1989).

The Court should be especially loath to depart from the statutory text here, because it would then have to give the term "whistleblower" different meanings in two different parts of the same statutory section—*i.e.*, the statutory definition (requiring reporting to the SEC) in the award provision, but a more expansive definition (dispensing with that requirement) in the anti-retaliation provision. The Court has repeatedly expressed reluctance about "giv[ing] the [same] word * * * different meanings within the same statutory section" where "the words of the statute are not ambiguous." *Mohasco Corp.* v. *Silver*, 447 U.S. 807, 818 (1980); see, *e.g.*, *Powerex Corp.* v. *Reliant Energy Services, Inc.*, 551 U.S. 224, 232 (2007); *Ratzlaf* v. *United States*, 510 U.S. 135, 143 (1994).

The Ninth Circuit and other lower courts have identified three purported absurdities in refusing to apply the statutory definition of "whistleblower" to the anti-retaliation provision. Each is illusory.

a. To begin with, lower courts have contended that applying the "whistleblower" definition to the anti-retaliation provision would leave the third clause with little work to do. See Pet. App. 8a; *Berman* v. *Neo@Ogilvy LLC*, 801 F.3d 145, 151-152 (2d Cir. 2015). But courts may not disregard unambiguous statutory language simply because that language may produce only "modest" "effect[s]." *Morrison* v. *National Australia Bank Ltd.*, 561 U.S. 247, 270 (2010). Notably, the lower courts that have advanced this contention have stopped short of suggesting that applying the "whistleblower" definition would render the third clause superfluous; as discussed

below, it plainly would not. That should end the analysis. As long as the plain-text interpretation gives the third clause some rational effect, courts cannot invoke the absurdity doctrine to rewrite the statute in order to achieve its supposed purpose "more effectively." *Pavelic & LeFlore*, 493 U.S. at 126.

In any event, the plain-text interpretation actually gives the third clause of the anti-retaliation provision substantial meaning. That clause states that a whistleblower is protected for "making disclosures that are required or protected" under certain federal laws. 15 U.S.C. 78u-6(h)(1)(A)(iii). Those disclosures need not be made to the SEC; they could be made to another entity, such as the individual's employer, another federal agency, or Congress. By incorporating the definition of "whistleblower," which requires reporting to the SEC, the anti-retaliation provision protects a whistleblower who reports misconduct *both* to the SEC *and* to another entity, but suffers retaliation "because of" the non-SEC disclosure. 15 U.S.C. 78u-6(h)(1)(A). So read, the third clause of the anti-retaliation provision covers a class of "whistleblowers" that the first and second clauses do not. See pp. 21-23, *supra*.

Lower courts have seemingly assumed that there are few, if any, individuals who report both internally and to the SEC and then face retaliation for the internal reporting. See Pet. App. 8a; *Berman*, 801 F.3d at 152. But there is no valid basis for that assumption. Indeed, because the SEC is required to protect the identity of whistleblowers, see 15 U.S.C. 78u-6(h)(2)(A), an employer will often be unaware that an employee has reported to the SEC. In that circumstance, any retaliation will necessarily be tied to the non-SEC disclosure.

Nor is it merely a theoretical possibility that an employer might retaliate against an employee in precisely

those circumstances. For example, in *Kramer* v. *Trans-Lux Corp.*, Civ. No. 11-1424, 2012 WL 4444820 (D. Conn. Sept. 25, 2012), an employee reported alleged misconduct to his superiors; then to the company's audit committee; and then to the SEC. See *id.* at *2-*3. The company allegedly began taking adverse action against the employee before his reporting to the SEC and took additional adverse action afterwards. See *ibid.*[4] Assuming that the employee reported to the SEC in the prescribed manner, see *id.* at *5, an employee in that situation would be protected by the third clause of the anti-retaliation provision.

What is more, lower courts have seemingly overlooked the category of cases in which an individual reports not internally, but instead both to the SEC and to another entity (such as to another federal agency, a law-enforcement official, or Congress). See 18 U.S.C. 1513(e), 1514A(a)(1). In those cases, too, an employee who suffered retaliation on account of the non-SEC disclosure would be protected by the third clause.

b. Lower courts have also suggested that a plain-text interpretation would be absurd because it would leave two specific groups of whistleblowers—lawyers and outside auditors—without a remedy under the Dodd-Frank Act's anti-retaliation provision. Those

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[4] Nor is it unusual for an employee to report both internally and to the SEC, as cases involving the Sarbanes-Oxley Act's anti-retaliation provision demonstrate. See, *e.g.*, *Gunther* v. *Deltek, Inc.*, ARB Nos. 13-68 & 13-69, 2014 WL 6850017, at *1 (DOL Adm. Rev. Bd. Nov. 26, 2014) (involving an employee who filed complaints of alleged wrongdoing with management and the SEC); *Menendez* v. *Halliburton, Inc.*, ARB Nos. 09-2 & 09-3, 2011 WL 4915750, at *2 (DOL Adm. Rev. Bd. Sept. 13, 2011) (involving an employee who reported concerns regarding accounting practices to the SEC and then to his employer's audit committee).

courts have assumed that, because outside auditors and certain lawyers are required to report wrongdoing they discover to company management, any retaliation would occur before the lawyer or auditor could report to the SEC. See Pet. App. 8a; *Berman*, 801 F.3d at 151-152.

As a preliminary matter, those courts have offered no support for the empirical assumption that any retaliation would occur immediately. But more broadly, there is no reason to believe that Congress particularly wanted to sweep lawyers and auditors within the ambit of the third clause (or, for that matter, the anti-retaliation provision more generally). To be sure, the third clause expressly refers to a provision concerning internal audit committees. See 15 U.S.C. 78u-6(h)(1)(A)(iii) (citing 15 U.S.C. 78j-1(m)). But the disclosures protected by that provision are reports by *employees* to audit committees regarding "questionable accounting or auditing matters," 15 U.S.C. 78j-1(m)(4)(B), and the reference to that provision makes clear that such a disclosure is protected under the anti-retaliation provision. Nothing about that reference, or anything else in the Dodd-Frank Act's anti-retaliation provision, indicates an affirmative intention to sweep in lawyers or auditors.[5]

The Sarbanes-Oxley Act's anti-retaliation provision stands in sharp contrast. As this Court recently explained in *Lawson*, that provision was specifically in-

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[5] In *Berman*, the Second Circuit observed that "[a]uditors are subject to subsection 78j-1 of the Exchange Act" and stated that the third clause of the Dodd-Frank Act's anti-retaliation provision "express[ly] cross-reference[s]" that provision, as if to suggest that the Congress that enacted the Dodd-Frank Act must have had auditors in mind. 801 F.3d at 151. But Congress specifically cross-referenced only subsection (m) of Section 78j-1, which involves reporting by *employees* to internal audit committees.

tended to cover outside professionals such as lawyers and auditors, as well as employees of companies. See 134 S. Ct. at 1169-1170. In *Lawson*, the Court concluded that employees of private contractors working for publicly traded companies can invoke the Sarbanes-Oxley Act's anti-retaliation provision upon suffering retaliation from their employers. See *id.* at 1176. The Court noted that retaliation by outside firms helped to keep the Enron scandal under wraps and that Congress enacted the anti-retaliation provision to encourage reporting by the employees of such firms. See *id.* at 1169-1170. Even if certain lawyers and auditors are outside the scope of the Dodd-Frank Act's anti-retaliation provision, therefore, they would be covered by the provision Congress intended for them under the Sarbanes-Oxley Act.

In any event, this Court has no obligation to stretch the Dodd-Frank Act's anti-retaliation provision to encompass categories of individuals that the plain text of the provision does not reach—even if it were desirable to do so as a policy matter. As this Court has noted, "Congress typically legislates by parts[,] addressing one thing without examining all others that might merit comparable treatment," and "this Court does not revise legislation * * * just because the text as written creates an apparent anomaly as to some subject it does not address." *Michigan* v. *Bay Mills Indian Community*, 134 S. Ct. 2024, 2033 (2014). Instead, the relevant inquiry is whether the result is "so bizarre that Congress could not have intended it." *Department of Revenue* v. *ACF Industries, Inc.*, 510 U.S. 332, 347 (1994) (internal quotation marks and citation omitted). An anti-retaliation provision that applies only to the defined category of "whistleblowers," but does not reach lawyers and auditors already covered by another anti-retaliation provision, is hardly in that category.

c. The SEC has also contended that, because the statutory definition of "whistleblower" contains the words "to the Commission," applying that definition to the anti-retaliation provision would render redundant the references to the SEC in the first and second clauses. See, *e.g.*, *Berman*, 801 F.3d at 154. But that contention ignores the fact that the "whistleblower" definition establishes the category of individuals protected from retaliation, whereas the three clauses set out the conduct that gives rise to a cause of action for retaliation. See 15 U.S.C. 78u-6(h)(1)(A). To invoke the anti-retaliation provision, an individual must *both* qualify as a "whistleblower" *and* suffer retaliation "because of" protected activity. *Ibid.* The fact that the same action may qualify a person as a "whistleblower" and trigger the conduct that gives rise to a cause of action—for example, reporting a securities-law violation "to the Commission"—does not create any redundancy or superfluity in the statute.

To be sure, it is theoretically possible that Congress could have written the statute more economically to avoid repeating "to the Commission" twice. But Congress is under no obligation to draft statutes with the fewest number of words possible. Congress may include "technically unnecessary" language to clarify or "remove any doubt" about an issue, and such clarifying language is not surplusage. *Ali* v. *Federal Bureau of Prisons*, 552 U.S. 214, 226 (2008) (citation omitted); see, *e.g.*, *Marx* v. *General Revenue Corp.*, 568 U.S. 371, 385 (2013). Here, Congress used similar language to define the category of individuals eligible to invoke the anti-retaliation provision and to define some of the conduct protected by that provision. There is nothing absurd about its decision to structure the statute in that way.

d. In arguing that a plain-text interpretation would produce absurd results, lower courts have placed great

weight on the Court's recent decision in *King* v. *Burwell*, 135 S. Ct. 2480 (2015). See Pet. App. 7a-8a; *Berman*, 801 F.3d at 150. But this case bears no resemblance to the unique facts of *King*. There, the Court construed a 900-page statute containing a "series of interlocking reforms designed to expand coverage in the individual health insurance market." 135 S. Ct. at 2485. After determining that the precise language at issue was ambiguous, see *id.* at 2491, the Court looked to the "broader structure of the Act to determine [its] meaning," and it chose the interpretation that was consistent with "Congress's plan" in enacting the statute as a whole, *id.* at 2492-2496.

This case, by contrast, involves the application of an expressly defined term in a single section of the Dodd-Frank Act. There is no relevant ambiguity either in the definition of "whistleblower" itself or in the applicability of that definition to the entire section, including the anti-retaliation provision. See pp. 16-18, *supra*. And as discussed above, applying the statutory definition of "whistleblower" to the anti-retaliation provision is perfectly consistent with "Congress's plan" to encourage the reporting of securities-law violations to the SEC. 135 S. Ct. at 2496; see pp. 24-26, *supra*.

2. If any interpretation would produce absurd results, it is the atextual interpretation adopted by the Ninth Circuit. The third clause of the anti-retaliation provision states that "[n]o employer" may retaliate against a whistleblower for "making disclosures that are required or protected" under a vast array of federal laws, including (1) the Sarbanes-Oxley Act of 2002; (2) "this chapter" (*i.e.*, the Securities Exchange Act of 1934); (3) Section 1513(e) of Title 18, a federal criminal statute prohibiting retaliation against witnesses; or (4) "any other law, rule, or regulation subject to the jurisdiction of the Commission" (including the Securities Act of 1933,

the Investment Company Act of 1940, and the Investment Advisers Act of 1940). 15 U.S.C. 78u-6(h)(1)(A)(iii). Without the limitations that the "whistleblower" definition provides, that clause would confer absurdly broad protection in situations having nothing to do with violations of the securities laws.

Consider, for example, an employee who is fired because he reported to the Federal Bureau of Investigation that a co-worker was dealing illegal drugs. Or consider an employee who is fired because he reported to a supervisor that a colleague defrauded a customer, in violation of the federal mail-fraud statute. Those disclosures have nothing to do with the securities laws or the SEC. But the first disclosure would be "protected" under 18 U.S.C. 1513(e), which covers any person who "provid[es] to a law enforcement officer any truthful information relating to the commission or possible commission of any Federal offense," and the second disclosure would be "protected" by the Sarbanes-Oxley Act's anti-retaliation provision, 18 U.S.C. 1514A(a)(1)(C). Without the limitations that the definition of "whistleblower" provides—specifically, that the individual provide information to the SEC and that the information relate to "a violation of the securities laws," 15 U.S.C. 78u-6(a)(6)—the employees in those scenarios would have a cause of action under the Dodd-Frank Act's anti-retaliation provision. Such a result, of course, would be completely out of step with the rest of Section 922(a) of the Dodd-Frank Act, which was intended to create incentives for individuals to report securities-law violations to the SEC. See pp. 20-24, *supra*.

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At bottom, there is simply no good reason here to deviate from the plain text of the statute—and, indeed, there is good reason to adhere to it. The Court should

"apply faithfully the law Congress has written," *Henson*, 137 S. Ct. at 1725, and adopt an interpretation of the anti-retaliation provision that requires a plaintiff to satisfy the statutory definition of "whistleblower" by reporting a securities-law violation to the SEC.

C. The SEC's Contrary Interpretation Is Not Entitled To Deference

Finally, the Ninth Circuit reasoned that, to the extent that the Dodd-Frank Act's whistleblower provisions are ambiguous, the SEC's interpretation of those provisions is entitled to deference under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). See Pet. App. 10a-11a. That reasoning is incorrect for two reasons. First, there is no ambiguity in the whistleblower provisions, and an agency is not entitled to deference where Congress has "directly spoken to the precise question at issue." *Chevron*, 467 U.S. at 842. Second, the SEC's rule adopting its more expansive interpretation was procedurally defective, because the SEC "fail[ed] to follow the correct procedures in issuing the regulation." *Encino Motorcars, LLC* v. *Navarro*, 136 S. Ct. 2117, 2125 (2016). For those reasons, the Ninth Circuit erred in according deference to the SEC's interpretation.

1. As discussed above, there is no ambiguity in the Dodd-Frank Act's whistleblower provisions. The text, structure, and history all point to the conclusion that the anti-retaliation provision applies only to a "whistleblower," as the statute defines the term. See pp. 16-30, *supra*.

Indeed, it is hard to imagine an agency interpretation that is more blatantly inconsistent with a statutory provision than this one. By its terms, the statutory provision defining "whistleblower" makes clear that the defi-

nition "shall apply" "[i]n this section": *i.e.*, to the award and anti-retaliation provisions alike. 15 U.S.C. 78u-6(a). In its final rule, however, the SEC set forth *two* definitions of "whistleblower": one (tracking the statutory definition) that applies for purposes of the award provision, see 17 C.F.R. 240.21F-2(a)(1), and another that applies only "[f]or purposes of the anti-retaliation [provision]," 17 C.F.R. 240.21F-2(b)(1).

It could not be clearer, moreover, that the latter definition departs from the statutory definition. Worse still, the SEC simply picked and chose the elements of the statutory definition that it liked. Most notably for present purposes, the SEC simply abandoned the statutory requirement that the individual report alleged misconduct *to the SEC*, instead defining "whistleblower" by reference to the substantive activity protected by the anti-retaliation provision. See 17 C.F.R. 240.21F-2(b)(1)(ii). But perhaps recognizing the obvious overbreadth of the resulting interpretation, see pp. 37-38, *supra*, the SEC sought to limit the scope of its substitute definition by requiring that the individual "possess[es] a reasonable belief that the information [the individual] [is] providing relates to a possible securities law violation." 17 C.F.R. 240.21F-2(b)(1)(i). The SEC thus retained a remnant of the statutory requirement that the reported misconduct relate to a "violation of the securities laws," 15 U.S.C. 78u-6(a)(6), but omitted the requirement that the report be "to the Commission," *ibid.*

To state the obvious, the SEC does not have the authority to rewrite the statute in that nakedly legislative manner.[6] As this Court recently explained, "*Chevron*

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[6] Notably, members of both houses of Congress recently proposed a bill amending Section 78u-6 to remove the "whistleblower" defini-

allows agencies to choose among competing reasonable interpretations of a statute; it does not license interpretive gerrymanders under which an agency keeps parts of statutory context it likes while throwing away parts it does not." *Michigan* v. *EPA*, 135 S. Ct. 2699, 2708 (2015). The Court need go no further to conclude that the SEC's interpretation is not entitled to deference.

2. Even if the whistleblower provisions were ambiguous, the SEC's interpretation would still not be entitled to deference, because the SEC "fail[ed] to follow the correct procedures in issuing the regulation." *Encino Motorcars*, 136 S. Ct. at 2125.

a. One of the most fundamental procedural requirements of rulemaking is that the notice of proposed rulemaking must include "either the terms or the substance of the proposed rule or a description of the subjects and issues involved." 5 U.S.C. 553(b)(3). In other words, the proposed rule must give "fair notice" of the final rule's contents. *Long Island Care at Home, Ltd.* v. *Coke*, 551 U.S. 158, 174 (2007).

The SEC's rulemaking flunked that requirement. In its notice of proposed rulemaking, the SEC proposed a rule that, consistent with the statutory definition, would have defined a "whistleblower" as an individual who "provide[s] information *to the Commission* that relates to a potential violation of the securities laws." 75 Fed. Reg. 70,488, 70,489, 70,519 (Nov. 17, 2010) (emphasis added). Six months later, however, the SEC reversed course in its final rule, unveiling its more expansive al-

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tion, but the proposal died in committee before any significant action. See Whistleblower Augmented Reward and Nonretaliation Act of 2016, H.R. 4619, 114th Cong. § 4(a) (2016); Whistleblower Augmented Reward and Nonretaliation Act of 2016, S. 2591, 114th Cong. § 4(1) (2016).

ternative definition of "whistleblower" for purposes of the anti-retaliation provision and abandoning the statutory requirement of reporting to the SEC. See 76 Fed. Reg. 34,300, 34,301-34,304, 34,363 (June 13, 2011).

That change was as unheralded as it was drastic. In its notice of proposed rulemaking, the SEC gave no hint that it was considering expanding the definition of "whistleblower" beyond the statutory definition to include individuals who have not reported alleged misconduct to the SEC, nor did it request comment on such an expansion. See 75 Fed. Reg. 70,489. And the SEC did not cite any of the more than 240 comments it received when it deviated from its proposed rule and adopted its more expansive alternative definition of "whistleblower" in the final rule.

This is therefore the paradigmatic situation in which an agency has failed to give "fair notice" of the contents of its final rule. *Long Island Care at Home*, 551 U.S. at 174. The final rule here cannot be justified as a "logical outgrowth" of the proposed rule, because the two are flatly inconsistent with each other. *Ibid.* (citation omitted). And as a result of the failure to provide fair notice—indeed, any notice—of what it was doing, the SEC deprived potentially affected parties of the "opportunity to respond to the proposal." *AFL-CIO* v. *Donovan*, 757 F.2d 330, 338 (D.C. Cir. 1985) (citation omitted). As a result, the SEC's interpretation in the final rule is invalid and not entitled to *Chevron* deference.

b. The SEC's final rule was also defective because the SEC did not adequately explain why it was expanding the definition of "whistleblower" beyond the statutory definition (even assuming it could have validly done so). Another fundamental requirement of rulemaking is that "an agency must give adequate reasons for its decisions." *Encino Motorcars*, 136 S. Ct. at 2125. To meet

that requirement, an agency's explanation must be "clear enough that its path may reasonably be discerned." *Ibid.* (internal quotation marks and citation omitted).

The SEC's rulemaking flunked that requirement as well. The only "explanation" the SEC offered in its final rule for its novel interpretation was the following: "[T]he statutory anti-retaliation protections apply to three different categories of whistleblowers, and the third category includes individuals who report to persons or governmental authorities other than the Commission." 76 Fed. Reg. 34,304 (emphasis omitted). That statement does not explain anything; it simply recites (incorrectly) the text of the statute. The SEC did not "analyze or explain" why it believed that interpretation was "more consistent with statutory language than alternative [interpretations]." *Encino Motorcars*, 136 S. Ct. at 2127 (internal quotation marks and citations omitted). Nor did the SEC explain why it was abandoning the definition that it had proposed in its notice of proposed rulemaking. And the SEC did not say "what (if anything) it found persuasive" in any of the more than 240 comments it received that compelled it to broaden the "whistleblower" definition for purposes of the anti-retaliation provision. *Id.* at 2127.

In short, the SEC failed to offer any explanation, let alone a substantial one, for its unexpected redefinition of the term "whistleblower." And it certainly did not draw a "rational connection between the facts found and the choice made." *Motor Vehicle Manufacturers Association of United States, Inc.* v. *State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 43 (1983) (internal quotation marks and citation omitted). For that reason, too, the SEC's interpretation in the final rule is invalid and not entitled to *Chevron* deference.

c. In apparent recognition of the deficiency of the final rule, the SEC issued further guidance several years later, purporting to interpret parts of the rule in the wake of the Fifth Circuit's decision in *Asadi* v. *G.E. Energy (USA), L.L.C.*, 720 F.3d 620 (2013). See 80 Fed. Reg. 47,829 (Aug. 10, 2015). In that guidance, the SEC sought to explain why it believed its definition of "whistleblower" best achieved its "overall goals in implementing the whistleblower program." *Id.* at 47,830.

Such *post hoc* interpretative guidance, however, cannot cure the procedural defects in its final rule. It is a "foundational principle of administrative law" that "a court may uphold agency action only on the grounds that the agency invoked when it took the action." *Michigan*, 135 S. Ct. at 2710 (citing *SEC* v. *Chenery Corp.*, 318 U.S. 80, 87 (1943)). The grounds that the SEC invoked when it took the action of redefining the term "whistleblower" were plainly deficient. See *ibid.* An agency cannot paper over such a deficiency by issuing an interpretive rule—without notice and comment—years after the fact. Cf. *Christopher* v. *SmithKline Beecham Corp.*, 567 U.S. 142, 155 (2012) (declining to defer to "*post hoc* rationalization[s] advanced by an agency seeking to defend past agency action against attack" (internal quotation marks and citation omitted)).

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As a result of those procedural defects, even if the whistleblower provisions were somehow ambiguous, the SEC's interpretation would be entitled to deference only insofar as it has the "power to persuade." *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944). Given the SEC's unexplained about-face in interpreting the statute; its selective incorporation of some aspects of the statutory definition but not others; and its anemic *post hoc* expla-

nation, the SEC's interpretation cannot meet even that more modest standard.

But more fundamentally, there is no statutory ambiguity for the SEC to resolve. By its plain terms, the Dodd-Frank Act's anti-retaliation provision requires a plaintiff to be a "whistleblower," and an individual must report a securities-law violation to the SEC in order to qualify. Because respondent concededly did not report the alleged misconduct at issue here to the SEC, he is not entitled to sue under the anti-retaliation provision. The Ninth Circuit's interpretation of the statute is atextual and simply untenable. Its judgment should therefore be reversed.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

BRIAN T. ASHE
KIRAN A. SELDON
SHIREEN Y. WETMORE
SEYFARTH SHAW LLP
560 Mission Street,
31st Floor
San Francisco, CA 94105

KYLE A. PETERSEN
SEYFARTH SHAW LLP
131 South Dearborn Street,
Suite 2400
Chicago, IL 60603

KANNON K. SHANMUGAM
AMY MASON SAHARIA
A. JOSHUA PODOLL
MENG JIA YANG
WILLIAMS & CONNOLLY LLP
725 Twelfth Street, N.W.
Washington, DC 20005
(202) 434-5000
kshanmugam@wc.com

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